meaning of the word costs[8]—would as effectively reduce the just compensation awarded him by the jury as would the requirements that he pay his statutory costs. Just compensation requires that all the necessary expenses of each of the parties in an eminent domain proceeding be paid by the condemnor. The condemnor accordingly should, we submit, pay the landowner's reasonable attorney's fees wherever the services of an attorney are necessary to insure the landowner's securing just compensation.

R. E. H.

INHERITANCE TAX: TAXING THE SURVIVOR OF JOINT TENANTS. —An inheritance tax is a constitutional excise tax levied upon the right of succession.[1] In California such a tax is even imposed upon a surviving wife's share in community property,[2] and upon a probate homestead.[3] The question then arises as to whether the interest of the survivor of joint tenants is subject to the tax. The Supreme Court in *McDougald v. Boyd*[4] held that it was not. The case arose out of the State's attempt to tax the survivor's interest in a joint account in a savings bank, which account was held in joint tenancy. The court, after deciding that such a joint interest was not taxable under the statute of 1911, adds that "a provision bearing upon this matter was enacted for the first time in the Act of 1913," and cites section 3c. The fair inference from this would appear to be that a survivor's interest would be taxable under the act of 1913, in virtue of section 3c. The matter is of great concern to those persons who have transferred their property in joint tenancy since 1913, for the reason that in such a case the law of the date of the transfer governs.[5] Strangely enough, however, the clause in question appears identically in the statute of 1911,[6] among the sections on appraisement and valuation. The same clause appears in the inheritance tax law of three other States and in each is found among the sections on appraisement and valuation.[7] This would seem to indicate that the section was not intended to cover the question of joint tenancy, and this is supported by the fact

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[8] Cal. Code Civ. Proc., § 1021; Miller v. Kehoe (1895), 107 Cal. 340, 40 Pac. 485.

[1] Knowlton v. Moore (1899), 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747; Snyder v. Bettman (1902), 190 U. S. 249, 47 L. Ed. 1035, 23 Sup. Ct. Rep. 803; In re Wilmerding (1897), 117 Cal. 281, 49 Pac. 181.

[2] Estate of Moffitt (1908), 153 Cal. 359, 95 Pac. 653, 20 L. R. A. (N. S.) 207; 4 California Law Review, 156.

[3] Cal. Stats. 1911, p. 714; Cal. Stats. 1913, p. 1068. Overruling Estate of Kennedy (1910), 157 Cal. 517, 108 Pac. 280, 29 L. R. A. (N. S.) 428, as to probate homestead, but not as to family allowances.

[4] (June 24, 1916), 52 Cal. Dec. 4, 159 Pac. 168.

[5] In re Webber (1912), 151 App. Dec. 539, 136 N. Y. Supp. 83.

[6] Cal. Stats. 1911, p. 721.

[7] Minn. Stats. 1911, c. 209; Wisc. Stats. 1903; Okla. Stats. 1908, c. 81.

that an amendment specifically covering the matter was required in 1915.[8]

A few cases in New York, at a time when they equally were without a clause covering the specific question, have undertaken to deal with the matter differently.[9] They declare that the creation of such tenancies, especially where the contribution comes wholly from the decedent, are transfers "intended to take effect in possession or enjoyment at or after death." It is now settled that this clause in inheritance tax laws is constitutional.[10] It is not too much to say, however, that the clause was intended to cover transfers where a life estate or income was reserved, and practically all the cases resting upon this clause are of this nature."[11] It is not difficult to see how joint tenancy lends itself to this treatment. Each joint tenant is regarded, for the purposes of this view, as having rights to the whole property, but also as having "a definite right to an equal half share of it," and the other half share survives to him only upon the death of the other tenant.[12] This does not accord, however, with the true nature of joint tenancy, where "in contemplation of law each tenant was seised of the whole estate from the first, and no change occurred in his title on the death of his co-tenant. It simply remained to him."[13] This is the position taken by the majority of cases where the question of levying an inheritance tax upon joint deposits has arisen.[14]

There would seem, however, to be no objection to the legislature passing a rule of construction, binding the courts to construe

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[8] Cal. Stats. 1915, c. 198.

[9] In re Durfee's Estate (1913), 79 Misc. Rep. 655, 140 N. Y. Supp. 594; In re Kline's Estate (1909), 65 Misc. Rep. 446, 121 N. Y. Supp. 1090; In re Von Bermuth's Estate (1913), 143 N. Y. Supp. 672; In re Reed's Estate (1915), 89 Misc. Rep. 632, 154 N. Y. Supp. 247.

[10] Estate of Keeney (1909), 194 N. Y. 281, 87 N. E. 428, affirmed in 222 U. S. 525, 56 L. Ed. 299, 32 Sup. Ct. Rep. 105; State v. Alston (1895), 94 Tenn. 674, 30 S. W. 950, 28 L. R. A. 178; Crocker v. Shaw (1899), 174 Mass. 266, 54 N. E. 549.

[11] Estate of Keeney, supra, n. 10; In re Spring (1912), 75 Misc. Rep. 586, 136 N. Y. Supp. 174; In re Patterson's Estate (1910), 127 N. Y. Supp. 284; In re Cornell's Estate (1902), 170 N. Y. 423, 63 N. E. 445; Douglas Co. v. Kountze (1909), 84 Neb. 506, 121 N. W. 593; State Street Trust Co. v. Stevens (1911), 209 Mass. 373, 95 N. E. 851; Ross on Inheritance Taxation, 160.

[12] Carr on Collective Ownership, 33; Freemen on Cotenancy and Partition, 121.

[13] Hanron v. So. Pac. R. R. Co. (1909), 12 Cal. App. 350, 107 Pac. 335; Kennedy v. McMurray (1915), 169 Cal. 287, 146 Pac. 647; Estate of Harris (1915), 169 Cal. 725, 147 Pac. 967; Crowley v. Savings Union Bank & Trust Co. (1916), 22 Cal. App. Dec. 597, 157 Pac. 516.

[14] In re Stebbin's Estate (1907), 52 Misc. Rep. 438, 103 N. Y. Supp. 563; In re Dalsimer's Estate (1915), 167 App. Div. 365, 153 N. Y. Supp. 58; In re Thompson's Estate (1915), 167 Rep. Div. 356, 153 N. Y. Supp. 164; In re Keils Estate (1915), 91 Misc. Rep. 667, 155 N. Y. Supp. 824; In re Tilley's Estate (1915), 166 App. Div. 240, 151 N. Y. Supp. 79, affirmed in 215 N. Y. 702, 109 N. E. 1094; Attorney General v. Clark (1915), 222 Mass. 291, 110 N. E. 299.

all joint tenancies created without valuable and adequate consideration as transfers intended to take effect in possession or enjoyment at or after death. This was done in California by the amendment of 1915.[15]

W. A. S.

LANDLORD AND TENANT: SURRENDER BY OPERATION OF LAW.—It has long since been decided in California that where a tenant vacates premises during his term, a surrender by operation of law takes place if the landlord forthwith re-lets to a third person for a longer period than the residue of the term, and this whether notice has been given to the tenant that he would still be held, or not.[1] The same is now decided to be true where the re-letting is for a period shorter than the residue of the term.[2] A recent comment in this Review pointed out the consistency of the latter position with that previously indicated as the probable rule in California.[3] In both situations possession had been taken by the lessee.

But suppose that after a lease is validly executed, but before possession is taken by the lessee, the latter declares his intention to rescind, and the lessor, without the lessee ever having taken possession, re-lets to a third person? The problem was raised for the first time in California by *Bernard v. Renard*.[4] It was decided that no surrender took place, the court emphasizing the absence of possession by the lessee, and declaring that the temporary re-letting to the third persons was no more an invasion of lessee's rights than was the occupancy of the lessor herself. The decision runs counter to both reason and authority.

The earliest and now accepted definition of surrender emphasizes the tenancy or interest and not the possession.[5] The emphasis is properly placed. Thus a surrender is regarded as resulting from the recognition by the landlord, with the tenant's consent, express or implied, of a subtenant in possession as his own immediate tenant.[6] So likewise, where a tenant during his term

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[15] Supra, n. 8.

[1] Welcome v. Hess (1891), 90 Cal. 507, 27 Pac. 369.

[2] Triest & Co. v. Goldstone (1916), 52 Cal. Dec. 232. See also 21 Cal. App. Dec. 257.

[3] 4 California Law Review, 158.

[4] (July 17, 1916), 23 Cal. App. Dec. 105.

[5] Surrender is defined by Lord Coke as a yielding up of an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them. Co. Litt. 337b.

[6] Stimmel v. Waters (1867), 65 Ky. 282; Snyder v. Parker (1898), 75 Mo. App. 529; Bailey v. Delaplaine (1847), 3 N. Y. Super. Ct. 5; Amory v. Kannoffsky (1875), 117 Mass. 351, 19 Am. Rep. 416; Thomas v. Cook (1818), 2 Barn. & Ald. 119. The explanation of the latter case in Wallis v. Stands (1893), 2 Ch. 75, while possibly true, does not eliminate the elements of estoppel for which the case is important.